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February 18, 1999

VIA HAND DELIVERY:

Karen Gulick, Esq.
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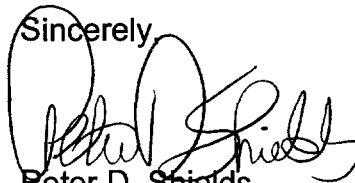
**Re: Summary of Reply Comments in CMRS Spectrum Cap Proceeding
(WT Docket 98-205, et al.)**

Dear Karen:

Please find enclosed for your use and review a summary of the reply comments filed in the CMRS Spectrum Cap Proceeding. In addition, an original and two copies of the summary will be filed today with the Secretary's office for inclusion in the docket of the above-captioned proceeding.

Please feel free to contact me with any questions concerning the enclosed materials.

Sincerely


Peter D. Shields

Enclosure

cc: Magalie Roman Salas, Secretary
(original and two copies)

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FEDERAL COMMUNICATIONS COMMISSION
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Summary of Reply Comments

WT Docket 98-205, *et al.*

1998 Biennial Regulatory Review – Spectrum Aggregation

Limits for Wireless Telecommunications Carriers

WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
February 16, 1999

FOREWORD

What follows is a brief summary of the reply comments filed in the FCC proceeding entitled *1998 Biennial Regulatory Review – Spectrum Aggregation Limits for Wireless Telecommunications Carriers*.¹ We have done our best to represent each commenter's positions accurately within a short space and in a consistent format. Due to space and time constraints, many supporting arguments have been truncated and rephrased. Accordingly, in all cases of particular importance, it is advisable to review the actual text. Copies of the reply comments can be obtained from Peter Shields at (202) 719-3249.

¹ *1998 Biennial Regulatory Review – Spectrum Aggregation Limits for Wireless Telecommunications Carriers*, WT Docket No. 98-205, *et al.*, FCC 98-308 (rel. Dec. 10, 1998).

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BELL ATLANTIC MOBILE, INC. ("BAM")

Interest: CMRS carrier

Reassessment of the CMRS Spectrum Cap ¶¶ 32-48

Service in Rural Areas ¶¶ 44-46

- Based on the record, there is no evidence that the cap is necessary to the provision of service in rural areas. In fact, one rural carrier expressed the view that the cap actually hinders the provision of rural service. (BAM 6-7)

Advancement of Competition in Local Markets ¶ 47

- The CMRS market is competitive now, which will thwart attempts to foreclose competition. Further, the cap is not a rational means to achieve competition. Rather, spectrum limitations have the effect of limiting competition. Finally, other sources of competition, such as LMDS and MSS, will undercut any attempt at monopolization. (BAM 3-5)
- The spectrum cap inhibits CMRS carriers from effectively competing with local exchange carriers. (BAM 6)
- The record documents that the cap prevents carriers from achieving the savings from economies of scale and scope that would reduce costs and lower prices. The cap also inhibits the development of a true nationwide service area. (BAM 7-8)
- Those parties arguing for retention of the cap merely recite the original rationale for keeping it without examining the market as it exists today. They point to the old market of two carriers dividing 50 MHz of spectrum. This is not how things look today. Today, six licensees are dividing three times more spectrum. The cap is an anachronism. (BAM 8-9)
- Proponents of the spectrum cap fail to show how it protects CMRS competition. Several findings, including build-out prices that preclude warehousing, available antitrust remedies, and possible increases in the supply of spectrum, point to a contrary conclusion. Proponents of the cap confuse competition with some number of competitors. In fact, however, the entry of only one PCS player lowers prices. It is unlikely that the number of competitors would dip below four if the cap were lifted, particularly given the efforts of AT&T Wireless, Sprint PCS, BAM, and Nextel to establish national footprints. These are guaranteed players in every market. (BAM 10-11)

- Sprint PCS's use of HHI data has no bearing on the validity of the cap. Simply put, the HHI data do not establish that the areas in question are "concentrated" in any meaningful sense. The relevant measure is the fact that spectrum is in the hands of multiple licensees. Because other entities are available to offer service, the market is not concentrated. Finally, Sprint PCS and other cap proponents fail to make any connection between the cap and more competition. In fact, Sprint PCS's assertion that the market is inadequately competitive, despite the existence of the cap, belies its theory. (BAM 11-13)
- Other parties supporting the cap reveal their self-interest by noting that lifting the cap will erode their own market position. This fear is groundless because the cap is unrelated to a specific entity's ability to compete. Further, it is not the FCC's job to protect a carrier's market share. (BAM 14)
- The cap also skews market forces. PCS carriers are free to use 45 MHz solely for digital services, whereas cellular carriers must provide analog and squeeze digital in where they can. PCS carriers support retention of the cap because it handicaps their cellular rivals. (BAM 14-15)
- PCIA's position is startling, given its vigorous advocacy for forbearance in other contexts because the market is "robustly" competitive. Now, PCIA argues that the market is only beginning to compete. This unexplained reversal precludes any reliance on PCIA's new position. (BAM 15-16)

Development and Deployment of New Technologies and Services ¶ 48

- Significant amounts of spectrum are needed to provide third generation ("3G") services. The record shows that retention of the cap will deter or impede the development of these offerings. (BAM 5-6)
- The cap does nothing to help the development of markets and services. Demand, not the cap, does that. PCIA's argument that the cap has forced cellular carriers to develop new technologies is unsupported and ignores the fact that cellular carriers would have developed advanced technologies anyway in response to demand. (BAM 16-17)

Modifications and Alternatives to Existing CMRS Spectrum Cap ¶¶ 49-79

Eliminate CMRS Spectrum Cap ¶¶ 74-79

- Whether the FCC evaluates the spectrum cap under Section 10 or Section 11, the result is the same – the spectrum cap must be repealed. (BAM 3)

Antitrust Enforcement

- Actions that aggregate spectrum are subject to antitrust review and other government and private remedies. The record shows that these measures are effective and far less draconian than the cap. (BAM 4-5)
- Opponents of repeal ignore the protections afforded by existing antitrust remedies and the Commission's power to license more spectrum. Also, private parties have the ability to initiate enforcement actions to stop such conduct. The availability of these remedies undercuts the necessity of the cap. (BAM 9-10)

Attachments

- Declaration of Robert W. Crandall and Robert H. Gertner. Used to show that the cap is not required to maintain CMRS market competition and rural market development. Cited by BAM extensively in its review of the record on these points.

BELLSOUTH CORPORATION (“BellSouth”)

Interest: Local exchange carrier, CMRS provider

Reassessment of the CMRS Spectrum Cap ¶¶ 32-48

Service in Rural Areas ¶¶ 44-46

- The cap prevents new entrants from affiliating with existing carriers and taking advantage of resultant economies of scale and scope that could offset significant expenses of providing service in rural areas. Eliminating the cap will hasten the arrival of competition and innovation in rural markets. (BellSouth 8)

Advancement of Competition in Local Markets ¶ 47

- As the majority of commenters note, given the dramatic changes in the CMRS marketplace since the cap was adopted, the cap is no longer necessary to promote competition or to prevent anticompetitive behavior and should be eliminated. (BellSouth 2)
- Those commenters who assert that competition in the wireless marketplace has not yet become “irrevocable” fail to focus on what the statutory language of Section 11 requires. Section 11 only requires “meaningful” competition, which currently exists. (BellSouth 4)
- The Commission should not try to determine some arbitrary number of providers that should ideally be operating in each market. There is no way to determine what number is “enough.” The right number of competitors is how many a free market produces. (BellSouth 6)

Modifications and Alternatives to Existing CMRS Spectrum Cap ¶¶ 49-79

Sunset CMRS Spectrum Cap ¶¶ 71-74

- If the spectrum cap is not eliminated, it should sunset at the conclusion of five years from the issuance of broadband PCS D, E, and F block licenses. This sunset date would coincide with the initial five-year construction requirements for these licensees. (BellSouth 12)

Eliminate CMRS Spectrum Cap ¶¶ 74-79

- Continued enforcement of the spectrum cap imposes significant costs on carriers, consumers, and the marketplace. It precludes the advancement of 3G wireless services, prevents carriers from taking advantage of market

efficiencies, and curtails competition in rural and unserved areas. (BellSouth 7-8)

Merger Related Issues

- There is no firm evidence that mergers involving acquisition of more than 45 MHz cause harm to competition. Some models predict adverse consequences, but these are transitory in value at most because of the rapidly changing nature of the CMRS market. (BellSouth 10)

Antitrust Enforcement:

- Given the existence of other regulatory and statutory safeguards, elimination of the cap will not open the floodgates to a wave of anticompetitive spectrum aggregation. Even in the absence of a cap, all proposed consolidations must undergo FCC transfer and assignment review and will still be subject to antitrust enforcement laws. (BellSouth 9)
- Although GTE's economist notes that the antitrust laws are a default mechanism against monopolization, "[t]he first line of defense against anticompetitive conduct is always the retributive threat of competition itself." (BellSouth 9-10)

Other Issues:

- PCIA and TDS contend that the Commission's PCS auctions were premised upon a market structure that included a spectrum cap, and that elimination of the cap cannot be justified absent a showing of "extraordinary circumstances." To the contrary, however, the Commission has statutory authority to change a rule despite the prior expectations of a party. (BellSouth 11)

CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION (“CTIA”)

Interest: Wireless trade association

Modifications and Alternatives to Existing CMRS Spectrum Cap ¶¶ 49-79

Forbearance From Enforcing The CMRS Spectrum Cap ¶¶ 63-71

- The CMRS market is robustly competitive, thus warranting forbearance from or elimination of the CMRS spectrum cap. (CTIA 2, 4-6)
- The CMRS marketplace is significantly more competitive now than it was five years ago when the Commission forbore from enforcement of significant regulatory burdens as applied to CMRS providers. Given the competitive conditions existing today, forbearance from enforcement of the spectrum cap is warranted. (CTIA 7)
- The Commission should not retain the spectrum cap to protect certain carriers that are unable to compete effectively. (CTIA 6)
- Economic analyses in the record demonstrate that removal of the spectrum cap will not result in a concentrated CMRS market. Moreover, under CTIA's recommended approach, the cap would not simply be abolished without further action. Rather, a more tailored regulatory alternative – case-by-case determinations of market power and concentration – would be applied. (CTIA 7-9)
- Commenters opposing CTIA's approach fail to acknowledge that market share analysis is only a screening tool and not a proxy for market power. (CTIA 10)
- Retention of the cap will disserve consumers because they will not reap the full benefits of competition including lower prices and the introduction of innovative services that stimulate demand for wireless services. (CTIA 6)
- TRA's claim that lifting the cap will increase the need for additional regulatory oversight reflects a fundamental misunderstanding of market analysis. TRA's argument is premised on the number of competitors and a flawed attempt to draw analogies to the long distance marketplace. In fact, concentration thresholds in the long distance market are much higher than in the CMRS marketplace. (CTIA 11-12)

Eliminate CMRS Spectrum Cap ¶¶ 74-79

- The Commission should forbear from or repeal in its entirety the 45 MHz CMRS spectrum cap. (CTIA 2)

Merger Related Issues

- If the Commission is concerned with issues of market certainty, it may rely on processing thresholds or a safe harbor approach as opposed to an inflexible spectrum cap. Under this approach, any transfer or acquisition that would not raise concerns under the current cap or some similar threshold would be permissible as within the safe harbor. Acquisitions in excess of the safe harbor would require additional FCC scrutiny. This approach would permit carriers and the investment community some degree of certainty without impairing the benefits associated with a case-by-case approach. (CTIA 15)

Antitrust Enforcement

- Retention of spectrum cap is not necessary to prevent carriers from exercising market power. (CTIA 7)
- Under CTIA's recommended approach, the FCC and other Federal antitrust authorities would retain full power to police the market. Moreover, a case-by-case determination of market power is more efficient than reliance on the spectrum cap and provides the same degree of regulatory certainty. (CTIA 9, 13-15)
- CTIA and other commenters agree that there are other, less restrictive means than the spectrum cap for policing against market power and concentration issues. While the cap prevents carriers from having the occasion to file Section 310(d) license transfer applications or from engaging in transactions that trigger Hart-Scott-Rodino or other Federal antitrust review, it does so at the cost of possible lost efficiencies. This result is only advisable if there is some basis for believing that the Federal government would be burdened by the volume of work to such an extent that it would shrink its statutory responsibilities. There is no evidence of this. (CTIA 14)

CHARITON VALLEY WIRELESS SERVICES (“Chariton”)

Interest: CMRS carrier

Reassessment of the CMRS Spectrum Cap ¶¶ 32-48

Service in Rural Areas ¶¶ 44-46

- Chariton wishes to expand the scope and breadth of its wireless offerings. However, the spectrum cap stands as an impediment to this goal. The economics of rural service areas do not support several stand-alone operators. RTG eloquently states the case for relief on behalf of rural carriers. (Chariton 2-3)

Modifications and Alternatives to Existing CMRS Spectrum Cap ¶¶ 49-79

Eliminate CMRS Spectrum Cap ¶¶ 74-79

- The FCC should repeal the spectrum cap because it impedes effective and efficient deployment of wireless services in rural areas. (Chariton 1)

D&E COMMUNICATIONS, INC. ("D&E")

Interest: Partner in PCS joint venture

Reassessment of the CMRS Spectrum Cap ¶¶ 32-48

Advancement of Competition in Local Markets ¶ 47

- The wireless marketplace, in all but the largest urban areas, is not yet truly competitive. Therefore, the CMRS spectrum cap is still necessary to advance the goals espoused by the Commission in establishing and maintaining the cap. (D&E 1)
- New entrants must be given more than a year or two to establish a market presence prior to elimination of the competitive safeguards of the spectrum cap. (D&E 3)

Merger Related Issues

- AT&T's recently announced acquisition of Vanguard Cellular presents an excellent example of the potential damage wrought to competition in central Pennsylvania if the spectrum cap is repealed. The merger would create a significant overlap in violation of the spectrum cap as a result of AT&T's ownership of 30 MHz of PCS spectrum in the Philadelphia MTA and Vanguard's ownership of 25 MHz of cellular spectrum in numerous Pennsylvania MSAs and RSAs. (D&E 2)
- AT&T's market dominance and financial clout will certainly have a negative impact on other carriers in these markets. Likewise, allowing AT&T to assume Vanguard's established customer base thwarts the development of new entrants. (D&E 3)

GTE SERVICE CORP. ("GTE")

Interest: Local exchange carrier, CMRS provider

Reassessment of the CMRS Spectrum Cap ¶¶ 32-48

Advancement of Competition in Local Markets ¶ 47

- The vast majority of commenters agree that competition in the CMRS marketplace is vigorous. This competition makes anti-competitive conduct exceedingly difficult and irrational from an economic standpoint. The CMRS marketplace is competitive because: the number of suppliers is increasing, substantial new wireless capacity is being added, and prices are falling. (GTE 5-9)
- Evidence of competition includes: (1) GTE's recent announcement of its own nationwide and wide-area regional pricing plans; (2) AirTouch's assertion that six or even seven competitive providers serve many markets; (3) Bell Atlantic Mobile's statistical analyses that prices fall once a new third carrier begins to compete with the two incumbent cellular providers; (4) Pacific Bell Wireless's success in signing up almost one million customers in less than 2 years. (GTE 5-9)
- The FCC should not be distracted from the overwhelming evidence of robust CMRS competition by the following nits offered by some commenters: (1) the market does not have the right number of competitors, (2) the competitors are not the right kinds of companies, or (3) customers are not properly distributed across the providers. (GTE 8-9)
- Criticisms of the CMRS marketplace are flawed because they fail to link the alleged market shortcomings with the presence or absence of the spectrum cap. (GTE 8-9)
- Six structural attributes of the CMRS marketplace further deter anti-competitive behavior: (1) national carriers with national pricing plans; (2) the difficulty of dominating the market for both spectrum and equipment; (3) the limited spectrum requirements needed to compete effectively in today's voice market; (4) the declining barriers to entry; (5) the durable nature of spectrum; and (6) the prohibitive costs of spectrum warehousing. (GTE 10-15)
- Numerous commenters agree with GTE that the spectrum cap results in serious efficiency losses. (GTE 21-22)

Development and Deployment of New Technologies and Services ¶ 48

- The opening comments support GTE's view that retention of the cap will have a deleterious impact on the CMRS market and consumers by: (1) inhibiting introduction of advanced services such as bandwidth-intensive 3G technologies; (2) preventing wireless carriers from meeting the growing consumer demand for bundled offerings; and (3) hindering important market efficiencies. (GTE 16-22)
- Sprint PCS's position that it may not be necessary to remove the spectrum cap to facilitate 3G products is not supported by technical evidence. Lifting the cap will encourage investment in new 3G products. Quantities of spectrum beyond the 45 MHz limit are needed to permit the deployment of bandwidth-intensive services as they develop. (GTE 18-19)
- Several commenters agree that the spectrum cap prevents carriers from meeting demand for bundled and other advanced wireless services. (GTE 20-21)
- The Commission should continue to monitor the CMRS market to determine if additional spectrum is needed to facilitate the provision of advanced offerings. (GTE 27)

Modifications and Alternatives to Existing CMRS Spectrum Cap ¶¶ 49-79

Eliminate CMRS Spectrum Cap ¶¶ 74-79

- GTE supports elimination of the spectrum cap. Continued application of the cap will impede introduction of new technologies, hinder wireless carriers from meeting consumer demand, and result in significant inefficiencies. (GTE 24, 27-28)

Cellular Cross-Interest Rule Modifications ¶¶ 79-85

- The Commission may wish to retain the cellular-cross interest rule to alleviate concerns about the level of competition in certain markets. (GTE 24-26)

Proposals for Rural Areas

- Numerous commenters agree that lost market efficiencies because of the spectrum cap will impede the provision of CMRS service to rural areas. (GTE 22-24)

Antitrust Enforcement

- Existing antitrust enforcement mechanisms should be the primary vehicle for protecting the CMRS market from anti-competitive conduct. The Sherman

and Clayton Acts provide substantial penalties against anti-competitive carriers. These provisions are supplemented by the Justice Department's power to prosecute collusion, the Federal Trade Commission's oversight, and private causes of action. (GTE 26-27)

NEXTEL COMMUNICATIONS, INC. (“Nextel”)

Interest: SMR carrier

Reassessment of the CMRS Spectrum Cap ¶¶ 32-48

Development and Deployment of New Technologies and Services ¶ 48

- Limiting Nextel or any other licensee to 15 MHz of 800 MHz SMR spectrum, as suggested by Southern Communications, would be an arbitrary restriction on the ability of SMR operators to compete with other CMRS carriers. In addition, such action would restrict the ability of SMR carriers to introduce innovative new products and services such as the recently announced “Nextel Online” family of wireless Internet services. (Nextel 15)

Modifications and Alternatives to Existing CMRS Spectrum Cap ¶¶ 49-79

Modification of 45 MHz Limitation ¶¶ 54-59

- Southern has failed to provide any reasoned basis for an SMR service-specific cap. (Nextel 5)
- Southern’s proposal to adopt a 15 MHz service-specific spectrum cap would restrict the ultimate competitiveness of one subset of CMRS competitors, thereby decreasing, rather than enhancing, CMRS competition. (Nextel 5)
- Southern’s comments attempt to construe the product market so that it includes nothing more than its own particular service, thereby ensuring its preservation without regard to marketplace realities or consumer needs. (Nextel 11)
- Establishing an arbitrary 15 MHz spectrum cap – well below the spectrum access provided other CMRS competitors – would not fulfill the Commission’s regulatory parity mandate. (Nextel 12)

PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION (“PCIA”)

Interest: Wireless trade association

Reassessment of the CMRS Spectrum Cap ¶¶ 32-48

Advancement of Competition in Local Markets ¶ 47

- Elimination of the spectrum cap will not facilitate competition but rather, will facilitate consolidation. (PCIA 4)
- The spectrum cap has created additional competitors and has forced existing competitors to use their spectrum more efficiently. (PCIA 6)

Development and Deployment of New Technologies and Services ¶ 48

- The spectrum cap has not demonstrably hindered development of new technologies or services in any way. The cap should remain for now only with regard to existing broadband, two-way spectrum. As additional spectrum is made available for new wireless services and technologies, carriers will have access to this spectrum. PCIA suggests that, even for broadband two-way spectrum, the cap should be increased proportionately to reflect any new spectrum allocated for these purposes. (PCIA 5)
- The Commission can conduct a follow-on inquiry to its recent Section 706 Report to Congress to consider a new spectrum allocation strategy or removal of barriers to dissemination of advanced wireless services if such services are not made available to the public. (PCIA 5)

Modifications and Alternatives to Existing CMRS Spectrum Cap ¶¶ 49-79

Eliminate CMRS Spectrum Cap ¶¶ 74-79

- Commenters supporting elimination of the cap did not produce any concrete evidence showing that wireless competitors are having difficulty providing services in any market due to the cap. (PCIA 3-4)
- Prices for wireless services will become competitive only if there are embedded competitors in the market. Thus, elimination of the cap at this time will injure competitors' start-up efforts. (PCIA 6)
- Eliminating the spectrum cap would radically alter the competitive landscape for PCS entrepreneurs, particularly in light of the upcoming broadband PC auction. (PCIA 7)

- Allowing control over spectrum to become more concentrated when competition for PCS is just beginning likely will reduce competition. (PCIA 14)

Merger Related Issues

- Market analysis using the Department of Justice's HHI index demonstrates that the market for PCS is highly concentrated. This suggests that the competitive benefits from PCS build-outs are far from fully realized. (PCIA 9-10)
- The spectrum cap preserves scarce Commission enforcement resources by eliminating unnecessary reviews of mergers that cannot pass muster. (PCIA 11)

Antitrust Enforcement

- Proponents of eliminating the cap argue that the cap is unnecessary given the availability of antitrust and public interest review by the FCC. However, the cap is useful because it provides market participants and potential bidders helpful information to the extent that the Commission is unwilling to allow individual markets to be dominated by a single firm or a few very large firms. The cap also preserves scarce FCC enforcement resources by eliminating mergers that would be destined to fail. In this latter respect, the cap also conserves the resources of third parties who would be forced to participate in FCC proceedings to protect their interest in a competitive market. (PCIA 11)

Attachments:

- Attachment A, Market Data Report, prepared by HAI Consulting, Inc., is heavily relied upon to demonstrate that the market for PCS is highly concentrated.
- Attachment B, Comparison of Subscriber Levels in Largest Cellular MSAs, is relied upon to show that competition for PCS is in the early stages.
- Attachment C sets forth the Qualifications of HAI Consulting, Inc, the consulting firm used to conduct PCIA's market analysis.

THE RURAL TELECOMMUNICATIONS GROUP (“RTG”)

Interest: Rural CMRS provider association

Reassessment of the CMRS Spectrum Cap ¶¶ 32-48

Service in Rural Areas ¶¶ 44-46

- In rural markets, the current spectrum cap discourages the deployment of innovative and advanced services and the introduction of competition. (RTG 1)
- The rural marketplace is a particularly challenging sector for telecommunications providers. (RTG 2)
- The FCC should eliminate the spectrum cap in order to encourage the development of competition in rural areas. (RTG 2)
- Due to the spectrum cap’s burdensome attribution rules, investors who might otherwise invest in rural ventures are limited in the number and scope of ventures in which they may participate. These investors are unable to utilize their capital reserves fully, resulting in fewer competitors in the rural market. (RTG 2)
- Even if the FCC increases the spectrum cap, unless such increase is significant (e.g., to at least 90 MHz), providers will still be unable to marshal adequate capital to construct new systems in rural areas. (RTG 3)

Development and Deployment of New Technologies and Services ¶ 48

- The FCC should eliminate the spectrum cap to encourage the deployment of advanced services in rural areas. (RTG 2)
- New and innovative services, such as high-speed wireless Internet access, require additional spectrum in excess of the current spectrum cap. Until the cap is lifted, rural carriers best situated to provide innovative new services will be unable to roll-out these offerings, enter new markets, and increase their coverage areas. (RTG 2)

Modifications and Alternatives to Existing CMRS Spectrum Cap ¶¶ 49-79

Modification of Ownership Attribution Thresholds ¶¶ 59-63

- Any modification of the spectrum cap rule, other than total elimination, would fail to rectify fully the damage caused by the cap. (RTG 2, 3)

Eliminate CMRS Spectrum Cap ¶¶ 74-79

- RTG agrees with those commenters who argue for swift elimination of the spectrum cap in order to promote competition and the deployment of advanced services, particularly in rural areas. (RTG 1, 3)

Other Issues:

- Auction No. 22 (the C block re-auction scheduled for March 23, 1999) should proceed on schedule, regardless of the status of this proceeding. (RTG 3-4)

**OFFICE OF ADVOCACY, UNITED STATES SMALL BUSINESS
ADMINISTRATION (“SBA”)**

Interest: Federal agency

Reassessment of the CMRS Spectrum Cap ¶¶ 32-48

Service in Rural Areas ¶¶ 44-46

- Although limited relaxation of the spectrum cap may be helpful to rural carriers, elimination of the cap while small carriers are still deploying their systems will detrimentally affect their ability to survive and compete in the CMRS marketplace. (SBA 2)
- The cap protects small CMRS providers who are more likely to provide service to niche markets often left unserved by larger carriers. (SBA 5)
- It would be inconsistent for the Commission to increase market entry barriers for small providers by eliminating the spectrum cap, given the FCC's universal service efforts. (SBA 6)

Advancement of Competition in Local Markets ¶ 47

- The spectrum cap has served a valuable and useful purpose by allowing competitors the time and opportunity to develop in the CMRS market and lowering entry barriers. (SBA 2)
- The spectrum cap has prevented market consolidation and prevented anti-competitive activities by incumbent CMRS providers while new entrants erected their systems and created a customer base. (SBA 3)
- Before the Commission eliminates or otherwise alters the spectrum cap, it should consider the effect on small business users and small mobile service providers. (SBA 2, 3)
- The Commission will be violating its statutory duty under Section 257 if it removes the spectrum cap while new entrants are still receiving licenses and have not begun to deploy their systems. The winners of the PCS C and F Block re-auction this March will be at a particular disadvantage, as they will be joining the marketplace late. Therefore, SBA recommends that the Commission not eliminate the spectrum cap in any market where all CMRS licenses have yet to be assigned. (SBA 4-5)

- SBA disagrees with the CTIA comments, which state that the competitive bidding set asides are sufficient to ensure that small businesses have the opportunity to compete. (SBA 5)
- By keeping a spectrum cap in place, the Commission will ensure that industry consolidation will not winnow the market down to a few large competitors. (SBA 5)
- Complete elimination of the spectrum cap could result in hoarding by licensees seeking to prevent competitors from entering the marketplace. (SBA 6)
- Regardless of the Commission's final decision, SBA recommends that the Commission consider the impact on CMRS carriers that have just entered the marketplace or are about to do so through re-auctions before any alteration to existing rules is made. (SBA 7)

Development and Deployment of New Technologies and Services ¶ 48

- The spectrum cap has served a valuable and useful purpose in encouraging technological innovation. (SBA 2)

Modifications and Alternatives to Existing CMRS Spectrum Cap ¶¶ 49-79

Modification of 45 MHz Limitation ¶¶ 54-59

- If the Commission decides that some regulatory relief is warranted, it must adopt measures necessary to prevent harm to small CMRS providers and to small business CMRS consumers. (SBA 4)
- First, all licenses must be assigned before the spectrum cap is relaxed. Removal of the spectrum cap before all new licensees have entered the marketplace would create a barrier to entry for these new entrants. (SBA 4)
- Second, the spectrum cap should only be raised – not eliminated – to ensure diversity, competition, and service to unserved areas. SBA concurs with commenters who favor raising the limit to a higher amount. SBA recommends a cap level that would ensure that at least three or four competitors still exist in any market. Any higher level could result in market concentration that would inhibit competition. (SBA 5)
- Third, any relaxation of the spectrum cap should be tailored to ensure that the various build-out requirements placed on all CMRS licensees are maintained. (SBA 6)
- Fourth, the Commission should apply any revision of the rules evenly to all markets. SBA agrees with commenters who recommend a bright-line test

because a consistent and uniform approach will aid small business development and facilitate financing. A case-by-case analysis would create uncertainty and confusion for small businesses and would be expensive and time consuming, requiring resources that small businesses do not possess in abundance. (SBA 6-7)

Eliminate CMRS Spectrum Cap ¶¶ 74-79

- SBA does not endorse elimination of the spectrum cap. (SBA 3-4)

Other Issues:

- SBA has a statutory duty to monitor and report on the Commission's compliance with the Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Subtitle II of the Contract with America Advancement Act. SBA has reviewed the Commission's Initial Regulatory Flexibility Analysis and found it sufficiently identified and describe the issues that would affect small businesses. (SBA 1-2, 7)

SBC WIRELESS, INC. ("SBC")

Interest: Wireless carrier

Reassessment of the CMRS Spectrum Cap ¶¶ 32-48.

Advancement of Competition in Local Markets ¶ 47

- Contrary to the comments of PCIA, there is no logical or factual argument that elimination of the cap will discourage a licensed carrier from constructing its network, or conversely, that continuation of the cap will encourage build-out. (SBC Wireless 3)

Development and Deployment of New Technologies and Services ¶ 48

- Although Sprint PCS contends that the spectrum cap promotes new technologies, additional spectrum will be necessary for 3G services and future innovations. In addition, Sprint PCS ignores the fact that fully utilized cellular networks face a valid and increasing capacity issue. When these networks are fully engaged in providing voice and current features to customers, and the number of customers and minutes of use continues to increase, a very real exhaustion issue exists. (SBC Wireless 3-4)

Modifications and Alternatives to Existing CMRS Spectrum Cap ¶¶ 49-79

Eliminate CMRS Spectrum Cap ¶¶ 74-79

- The FCC has an obligation to eliminate rules no longer appropriate in a changed competitive environment. The current wireless market is fully competitive, unlike the commercial backdrop that existed when the spectrum cap was adopted. (SBC Wireless 2-3)

Merger Related Issues

- Sprint PCS's claim that proposed mergers could decrease competition conveniently ignores the fact that both the Bell Atlantic/GTE and SBC/Ameritech mergers are subject to DOJ and FCC transfer of control review. Moreover, Sprint PCS is simply wrong in its assertion that the overlap markets that exist in the SBC/Ameritech merger would be operated by a single carrier. (SBC Wireless 4)

Antitrust Enforcement

- Sufficient safeguards exist to ensure that mergers do not decrease competition in the wireless market. The Department of Justice scrutinizes

major transactions and the FCC reviews transfers of control. (SBC Wireless 2, 4)

- Department of Justice oversight is a powerful tool to prevent anti-competitive acts. (SBC Wireless 4)

TELEPHONE AND DATA SYSTEMS, INC. (“TDS”)

Interest: PCS and cellular service provider

Reassessment of the CMRS Spectrum Cap ¶¶ 32-48.

Advancement of Competition in Local Markets ¶ 47

- The claim of many large CMRS carriers that competition exists in local markets for wireless telephony is unsupported, misleading, and ignores meaningful benchmarks for reviewing industry consolidation. (TDS 4)

Modifications and Alternatives to Existing CMRS Spectrum Cap ¶¶ 49-79

Forbearance From Enforcing The CMRS Spectrum Cap ¶¶ 63-71

- Forbearance from enforcement of the spectrum cap will not enhance opportunities for robust competition, will not expand statutorily mandated diversity of ownership, and will not otherwise assure consumer benefits beyond those already being experienced under the current rule. (TDS 8)

Eliminate CMRS Spectrum Cap ¶¶ 74-79

- The consumer benefits anticipated by the Commission in adopting the spectrum cap are only now beginning to be achieved. Maintaining the cap is the only way to meet the Congressionally mandated goal of “meaningful economic competition.” (TDS 5)
- Spectrum cap rules are needed to promote economic opportunity in the post-auction market and disseminate licenses among a wide variety of applicants. (TDS 7)

Cellular Cross-Interest Rule Modifications ¶¶ 79-85

- Section 22.942 should be modified to coincide with the attribution standards in Section 20.6. (TDS 9)

TRITON CELLULAR PARTNERS, L.P. (“Triton”)

Interest: CMRS provider

Reassessment of the CMRS Spectrum Cap ¶¶ 32-48

Service in Rural Areas ¶¶ 44-46

- Rural areas are hurt the most by the spectrum cap and associated attribution rules because these rules tend to slow the deployment of new wireless services. Reform of the attribution rules is even more desperately needed in rural areas than in metropolitan areas. (Triton 4)

Advancement of Competition in Local Markets ¶ 47

- The current spectrum cap and its associated attribution rules do not fulfill the stated goals of the FCC to foster competition and to regulate only when fixing an obvious market failure. (Triton 4)

Development and Deployment of New Technologies and Services ¶ 48

- The attribution rules are outdated and could have a chilling effect on investment and innovation. (Triton 2)

Modifications and Alternatives to Existing CMRS Spectrum Cap ¶¶ 49-79

Modification of Ownership Attribution Thresholds ¶¶ 59-63

- The attribution rules associated with the spectrum cap should be significantly modified. In its present form, the spectrum cap frustrates investment and impedes the introduction of wireless competition – the very opposite of its intended result. (Triton 1-2)
- Commenters generally support replacement of the current attribution standards with a control test. (Triton 2)
- A majority of the commenters agree that the spectrum cap should be eliminated, which would of course render moot any concern about the attribution standard. Even those commenters who believe the cap is still needed do not refute Triton’s claim that the existing attribution rules should be modified to promote effective investment opportunities. (Triton 2)
- Like Triton, AT&T Wireless, noting that the attribution rules are outdated and could have a chilling effect on investment and innovation, urges the FCC to repeal the 20 percent attribution rule and permit investments up to *de facto* or *de jure* control without attribution. (Triton 2)

- The suggestion of some commenters that the attribution rules contain an exemption for “insulated” officers and directors would not afford any help to entrepreneurial companies such as Triton, whose only business is the provision of CMRS services. There would be no way for an investor-appointed director of Triton to be insulated from Triton’s CMRS activities. For this reason, the Commission should not view insulation as a substitute for real attribution relief. (Triton 3)
- The FCC should ensure that equity ownership and director and officer positions that do not convey control are not deemed attributable interests for purposes of the spectrum cap. (Triton 4)

U S WEST WIRELESS, L.L.C. ("U S West")

Interest: PCS carrier - D and E Block licensee

Reassessment of the CMRS Spectrum Cap ¶¶ 32-48

Service in Rural Areas ¶¶ 44-46

- Competition in the CMRS market is still in its early stages. CMRS customers in approximately 40 percent of all BTAs nationwide do not have access to either a PCS or digital SMR provider. The spectrum cap preserves diversity in all markets, especially rural areas. (U S West 3)

Advancement of Competition in Local Markets ¶ 47

- The spectrum cap encourages competition in local markets because it prevents any single competitor from acquiring an undue concentration of spectrum. (U S West 2)
- The most recent data indicate that 87 percent of all broadband CMRS customers are served by an incumbent cellular carrier. Also, in the five largest metropolitan corridors where U S West operates, the incumbent cellular carriers have more than 60 percent market share. Given these statistics, U S West Wireless faces an uphill battle to gain market share from entrenched incumbents. (U S West 3)

Development and Deployment of New Technologies and Services ¶ 48

- The allocation of additional spectrum may be needed as wireless applications evolve for 3G technologies. At this time, however, raising the spectrum cap is premature. (U S West 5 n.15)
- The spectrum cap encourages incumbent cellular carriers to convert their analog systems to more efficient digital technologies. With the development of 3G technologies, spectrum efficiency should continue to increase rapidly under the spectrum cap. (U S West 4)
- Comments that the spectrum cap must be eliminated to accommodate new 3G technologies are generalized and speculative. (U S West 4)

Modifications and Alternatives to Existing CMRS Spectrum Cap ¶¶ 49-79

Modification of 45 MHz Limitation ¶¶ 54-59

- The spectrum cap should be retained at this time and the Commission should revisit the issue in the next biennial review. At this time, the cap is needed to preserve competition and encourage efficiency and innovation. (U S West 4)

Eliminate CMRS Spectrum Cap ¶¶ 74-79

- It would be premature to remove the spectrum cap because the PCS industry is still nascent. The Commission has recognized that the new PCS entrants are still in the early stages of competing with incumbent cellular carriers. (U S West 2)

WESTERN WIRELESS CORPORATION ("Western Wireless")

Interest: CMRS carrier

Reassessment of the CMRS Spectrum Cap ¶¶ 32-48

Service in Rural Areas ¶¶ 44-46

- The evidence in the record shows that the spectrum cap is a barrier to service in rural areas. Elimination of the cap will enable incumbent and new carriers to take advantage of economies of scale and scope. Several carriers familiar with the rural market advocate eliminating the cap. They note that the cap prevents carriers from entering into joint ventures or strategic alliances with other providers to help speed service to rural areas. (Western Wireless 17-18)
- Build-out of PCS in rural areas will only be the result of demand for service in those areas. The cap amplifies this problem by preventing carriers from reducing costs. (Western Wireless 19)

Advancement of Competition in Local Markets ¶ 47

- The Commission itself recognizes that the CMRS market is competitive. The record further shows that competition will only continue to grow. (Western Wireless 10-11)
- The cap initially played a role in developing a competitive market. The objectives of the cap were, however, tied to the initial licensing stage of PCS, which is no longer applicable. Spectrum alone is all that is required to obtain access to the market. (Western Wireless 11-12)
- Competition is spurred by market forces, such as new entrants, technological development, and innovative pricing, and by other Commission action, such as additional auctions of spectrum, minimum coverage benchmarks, and liberal partitioning and disaggregation rules; competition is not promoted by the cap. (Western Wireless 12)
- PCIA's arguments that the cellular "head start" could restrict competition does not warrant retaining the spectrum cap. First, PCIA has admitted that the CMRS market is competitive in its resale forbearance comments. Second, the advantage of incumbency will diminish as more PCS players enter the market. Third, any attempts at monopolization will generate a response from numerous other competitors, including players with only 10 MHz of spectrum and other SMR, LMDS, and mobile satellite providers. (Western Wireless 13-14)

- Elimination of the cap will not result in excessive consolidation. First, consolidation is not, in and of itself, harmful to competition. Consolidation allows carriers to take advantage of economies of scale, expand area-wide footprints, and compete more effectively with wireline carriers. (Western Wireless 14-15)
- The cap was designed to guard against behavior that makes no economic sense in the CMRS marketplace. Aggregation only makes sense if the spectrum will be used, not warehoused. The fact that only a couple of carriers are bumping up against the cap illustrates the fact that aggregating spectrum for the sake of aggregation is not in the economic interest of carriers. (Western Wireless 16-17)

Development and Deployment of New Technologies and Services ¶ 48

- New applications for existing technologies are being announced almost daily – local exchange service, Internet access, video and data services. In fact, wireless data traffic is expected to outstrip voice traffic in the next few years. The Commission itself has pointed to the wireless industry as a particularly important source of competition to ILECs. Therefore, the FCC should allow flexible use of spectrum to promote this competition. The spectrum cap artificially restricts the ability of wireless carriers to develop these new products and services, or to compete with other established services. (Western Wireless 23-25)

Modifications and Alternatives to Existing CMRS Spectrum Cap ¶¶ 49-79

Eliminate CMRS Spectrum Cap ¶¶ 74-79

- The spectrum cap is superfluous to the Commission's policy objectives and should be eliminated. Section 11 requires an affirmative finding that the regulation is *necessary* to achieve the Commission's goals. Based on the record, meaningful competition exists in the CMRS market and the cap is not necessary to either stimulate, preserve, or protect this market. (Western Wireless 3-4)
- Opponents to elimination of the cap do not meet the evidentiary burden of Section 11 because they have failed to show how the cap is necessary. The fact that only 10 MHz of spectrum is needed to compete eliminates any threat of monopolization. Sprint PCS failed to link the elimination of a cap to the elimination of competition. Further, Sprint PCS's market share evidence is based on flawed data. Finally, Sprint PCS's argument that the cap is not hindering the provision of service stands the Section 11 presumption on its head. (Western Wireless 4-9).

Antitrust Enforcement

- The threat from consolidation is minimized by the Commission's authority under Section 310 to review and approve transfers. The spectrum cap is an inappropriate tool to distinguish between beneficial consolidation efforts and those that are anti-competitive. (Western Wireless 16)
- As illustrated in the comments filed by AT&T Wireless, the spectrum cap blocks transactions that do not raise anti-competitive concerns or violate the 1992 merger guidelines. Further, the cap prevents parties from making a showing that the pro-competitive benefits of a merger outweigh any negative effects. For example, in the cases of Western Wireless's two waiver petitions, the HHI is below the 1900 level deemed presumptively competitive by the FCC. Yet, without a waiver, Western Wireless will be forced to divest cellular or PCS spectrum. The record shows that this scenario is being faced by other carriers and is preventing affiliation arrangements that would expand service. (Western Wireless 20-21)